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No. 10-911

Supreme Court, U.S.
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In the
Supreme Court of the United States

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN
and VERIZON COMMUNICATIONS, INC.,
Cross-Petitioners,

v.

CYNTHIA YOUNG, individually and on behalf of
all others similarly situated,
Cross-Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a conflicted ERISA plan administrator with authority to interpret a plan have the power to unilaterally and retroactively change the plan's language to conform to the plan sponsor's intent?

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STATEMENT OF THE CASE

Verizon's cross-petition does not raise an issue worthy of this Court's review. True, it does suggest another possible answer to the exceptionally important question of federal law underlying Plaintiffs' petition: How should the federal courts handle negligently drafted ERISA plans that promise benefits not intended by the employers who adopt them?

But Verizon's proposed solution—allowing conflicted plan administrators to unilaterally rewrite plan terms they contend are "mistaken" and then requiring federal courts to defer to those decisions—is not a reasonable alternative. That idea has been rejected by every court to have considered the issue. It is contrary to the very structure of ERISA and the history of common-law reformation. And it was never adopted by Verizon in the Plan or argued to the Seventh Circuit as a proposed solution to this recurring and important question of federal law.

This Court, then, should grant Plaintiffs' petition on all three questions presented but deny Verizon's cross-petition.

Before proceeding to the law, Verizon's statement of the case makes two serious misstatements of fact. First, Verizon claims it "changed" the Plan's benefit formula seven months *before* it adopted the formal Plan document in July 1996. Cross-Pet. 2. The implication is that the Plan document was an after-the-fact formality, allowing the courts to disregard its written terms. While Verizon may have treated the Plan document as a mere formality, the district court held that the Plan's benefit formula was not changed

as a matter of law until the "official plan document" was "finalized" in July 1996 (although the change was "made retroactive to December 31, 1995"). App. 146a.[1] That was the right decision, and Verizon never appealed it.

Second, Verizon asserts that "[i]t is undisputed that the mistake was a scrivener's error." Cross-Pet. 2. But Plaintiffs have always disputed that. A scrivener's error is a particular type of drafting mistake. It occurs when two parties reach an agreement through negotiations, but subsequently mistakenly transcribe it. *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513, 518 (4th Cir. 1980). That is, it is a *mutual* mistake made by both parties. *Int'l Union v. Murata N. Am. Inc.*, 980 F.2d 889, 907 (3d Cir. 1992) (employer seeking reformation of alleged ERISA scrivener's error required to prove "that the mistake does not reflect the intent of the parties" through "history of collective bargaining negotiations"); *Wilson v. Moog Auto., Inc. Pension Plan*, 193 F.3d 1004, 1009 (8th Cir. 1999) (employer required to prove "the intent of the parties" through "negotiations between the Union and the Company").[2]

As Plaintiffs describe in detail in their petition at 20–23, Verizon clearly made a *unilateral* drafting mistake. But it never introduced any evidence at trial that any particular class member (let alone all 13,784

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[1] "App." refers to the appendix to Plaintiffs' petition for writ of certiorari in No. 10-765.

[2] *But see Stanford v. Foamex L.P.*, No. 07-4225, 2010 WL 3488651, at *9 n.14 (E.D. Pa. Aug. 31, 2010) (finding circuit split on elements of ERISA scrivener's-error claim).

of them) negotiated, bargained for, or "agreed" to any formula other than what was clearly spelled out in the Plan document. *See Cross v. Bragg*, 329 Fed. Appx. 443, 445 (4th Cir. 2009) ("[I]gnorance of a mistake is insufficient proof of a party's intent to the contrary.").

REASONS FOR DENYING THE CROSS-PETITION

I. There is no circuit split regarding the question presented in Verizon's cross-petition.

The district court in this case relied heavily upon the Fourth Circuit's reasoning in *Blackshear v. Reliance Standard Life*, 509 F.3d 634, 642–43 (4th Cir. 2007), in finding Verizon did not have the power to unilaterally reform the Plan in the administrative process. App. 182–84. Yet Verizon chose not to discuss *Blackshear*—the only circuit court decision on point—in its cross-petition. Verizon does not even cite the case.

In *Blackshear*, the Fourth Circuit held,

> The doctrine of equitable reformation does not apply in the context of an administrator's interpretation of an ERISA plan; the administrator cannot simply "reform" a plan to correct what it unilaterally perceives to be a mistake or error contained in the plan's written terms. Rather, reformation, like other forms of equitable relief, must be requested by the party seeking to reform the contract and granted by a court.

509 F.3d at 642–43. In so doing, the Fourth Circuit reversed the district court for allowing a plan administrator to rewrite allegedly mistaken plan terms, even though an express "clerical-errors" clause in the plan document purported to authorize it. *Id.* at 641–42.

The reasoning for this holding is unimpeachable. Mistakes, under the common law of contracts, have "no legal effect" in and of themselves. *Id.* at 642 (citing 27 Williston on Contracts § 70:17). Rather, such mistakes will be "correct[ed]" only when equity so requires. *Id.* And making those equitable determinations and reforming (or "correcting" as Verizon calls it in its cross-petition) a contract is reserved for "a court in equity." *Id.*

The Fourth Circuit's holding is completely consistent with the common law and ERISA's purposes as well. A contracting party can never unilaterally decide a contract is mistaken, rewrite it, and expect a court to enforce the rewritten terms retroactively against the opposing party. *Id.* Similarly, under the common law of trusts, a trustee cannot unilaterally rewrite the terms of a trust as it sees fit—it must petition a court and seek reformation of the trust. App. 185a. Even if the trustee is merely "in doubt" regarding the terms of the trust, it must "obtain[] instructions from the court." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

ERISA is even stricter than the common law. It imposes a fiduciary duty on the plan administrator to act "in accordance with" the plan document insofar as it is consistent with ERISA. 29 U.S.C. § 1104(a)(1)(D). Accordingly, "to the extent [the plan administrator]

ignore[s] the unambiguous written terms of the plan and denie[s] benefits based on extrinsic evidence of the 'true intent' of the contracting parties, [the plan administrator] act[s] outside the scope of its discretion." *Blackshear*, 509 F.3d at 643. This requirement dovetails perfectly with ERISA § 502(a)(3)(B)(i)–(ii), which allows a plan administrator to seek equitable relief—including reformation—*only* to "redress" violations or "enforce" the terms of ERISA or an ERISA plan. 29 U.S.C. § 1132(a)(3)(B)(i)–(ii).[3]

So, in seeking the power to rewrite Plan terms unilaterally, Verizon is asking this Court to make the standards for reforming an ERISA-governed plan less stringent than an ordinary common-law contract or trust. Why would ERISA make it *easier* for an employer to reform a plan against its employees when the statute was passed specifically to *restrict* an employer's ability to renege on written promises? *See* H.R. Rep. No. 93-807, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4672.

Further, allowing plan administrators to rewrite plan terms unilaterally would violate ERISA's plan-documents rule by slowing benefit claims, creating uncertainty, and injecting "enquiries into nice expressions of intent" into the administrative process. *Kennedy v. Plan Adm'r for DuPont Savs. & Inv. Plan*, 129 S. Ct. 865, 875–76 (2009). Verizon argues that if

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[3] As Plaintiffs have maintained at every stage of this litigation, the district court lacked subject-matter jurisdiction over Verizon's reformation claim because Verizon failed to "independently alleg[e] a violation of an ERISA provision or term of the plan," as required by § 502(a)(3)(B)(i)–(ii). *Peacock v. Thomas*, 516 U.S. 349, 354 (1996).

the district court had only reviewed its decision with deference, all the "administration costs, or litigation expenses" would have been avoided in this case, Cross-Pet. 9 & 10 n.2. But Verizon's own cross-petition admits that Verizon reviewed tens of thousands of pages of non-Plan documents to determine its own, decade-old intent, rather than follow the Plan. Cross-Pet. 5. That is precisely what the unanimous court in *Kennedy* prohibited. *Kennedy*, 129 S. Ct. at 876. That this complex inquiry took place in the administrative process does not ameliorate the conflict. *Id.*

Indeed, the idea that ERISA allows a conflicted plan administrator like Verizon to unilaterally rewrite promised plan terms due to its own intent-based and equitable determinations is absurd. The individual members of the Verizon Claims Review Unit and the Verizon Employee Benefits Committee who would be making these decisions are Verizon employees. App. 169a. They cannot be expected to hold their employer to heightened standards of proof or impartially make billion-dollar equitable determinations that might hurt their employer. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 112–13 (2008).

II. Even if ERISA allowed a plan to authorize a plan administrator to reform plan terms without court intervention, the Plan here did not authorize Verizon to do so.

Some ERISA plan sponsors have tried to convey the power to decide scrivener's errors in the administrative process to themselves as plan administrators. *See, e.g.*, *Blackshear*, 509 F.3d at 638; Paul Hastings Client Alert, *Correcting Scrivener's Error—How Helpful Will Courts Be?*, http://www.

paulhastings.com/assets/publications/1448.pdf (last visited Mar. 17, 2011). But these clauses have been struck down. *See, e.g*, *Blackshear*, 509 F.3d at 643. Plaintiffs could not find a single case upholding such a clause, and Verizon has cited none.

Even if such clauses were allowed, the Plan at issue here does not contain one. Instead, the Plan limits the Plan administrator to "interpreting" the Plan document. Cross-Pet. 2. "Interpreting" a document is simply not synonymous with "rewriting," "reforming," or "correcting" a document. One action—interpretation —takes the words on a page and applies a reasonable meaning to them. The other—reformation or correction—does not apply a reasonable meaning to the words on a page; it eliminates those words and replaces them with others. *See Cozzie v. Metro. Life Ins. Co.*, 140 F.3d 1104, 1108 (7th Cir. 1998) ("Interpretation and modification are different; the power to do the first does not imply the power to do the second.").

Perhaps because the Plan does not contain a scrivener's-error clause, Verizon chose not to argue the question presented in its cross-petition to the Seventh Circuit. Instead, it argued that the Plan was ambiguous and so it had the power to interpret the ambiguity. Thus, in its cross-appeal to the Seventh Circuit, Verizon framed the issue as whether it "reasonably denied plaintiff's transition factor claim where the Committee, *having identified both intrinsic and extrinsic ambiguity* created by the duplicative reference to the transition factor, interpreted the Plan to require plaintiff's opening balance to be calculated without regard to such duplicative reference." Verizon's Cross-Appeal, 2010 WL 2357583, at *2 (7th

Cir.) (emphasis added). It then spent six pages vainly arguing that the clear mathematical formula contained in Plan § 16.5.1(a)(2) was somehow ambiguous. *Id.* *49–55. But it never argued, in the alternative, that even if the Plan formula was unambiguous it could reform it without court intervention. *Id.*

So contrary to Verizon's assertion, Cross-Pet. 6, the Seventh Circuit *did* address Verizon's argument. It simply found the Plan unambiguous, App. 19a, which was the extent of Verizon's appeal on that subject. Consequently, the Court should reject the question presented in Verizon's cross-petition because it was not raised before the Seventh Circuit. *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007).

III. Verizon's cross-petition highlights the importance of Plaintiffs' petition.

The fact that ERISA attorneys are advising plan sponsors to adopt scrivener's-error clauses in plans (and that employers are heeding that advice, *see, e.g.*, *Blackshear*, 509 F.3d at 638) points out a significant problem in the world of pension plans. Verizon's request that this Court transmogrify the power to interpret ERISA plans into the power to equitably reform them merely highlights the problem.

First, it shows that drafting errors are more common than Verizon lets on. If drafting errors were as "rare" as Verizon asserts, Cross-Pet. 3, why are ERISA attorneys advising employers to adopt these provisions? And why, if the law is so settled in this area and the occurrences so rare, as Verizon argues,

are legal commentators so interested in this case?[4] Indeed, why are so many ERISA attorneys advising their clients that the law is *unsettled*?[5]

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[4] *See, e.g.*, Stanley D. Baum, *The Big Dent in ERISA's Written Plan Requirement—Young v. Verizon's Bell Atlantic Cash Balance Plan*, BNA Pension & Benefits Daily (Nov. 5, 2010); Allison Frankel, *In the Case of the Billion-Dollar ERISA Typo, 7th Circuit Upholds Win for Verizon*, Law.com (Aug. 13, 2010), http://www.law.com/jsp/article.jsp?id=1202465836032&rss=newswire; Jonathan Stempel, *Verizon $1.67 Bln. Typo Can be Fixed—Court*, Reuters (Aug. 11, 2010); Robert Steyer, *Appellate Court Rules in Verizon's Favor in ERISA Case*, Pensions & Investments (Aug. 11, 2010), http://www.pionline.com/article/20100811/DAILYREG/100819967; Debra Cassens Weiss, *7th Circuit Allows Fix of In-House Lawyer's $1.67B Mistake*, ABA Journal (Aug. 11, 2010), http://www.abajournal.com/mobile/comments/7th_circuit_allows_fix_of_in-house_lawyers_1.67b_scriveners_error/; *Verizon Can Fix Pension Error, 7th Circuit Rules*, Courthouse News Service (Aug. 11, 2010), http://www.courthousenews.com/2010/08/11/29516.htm; Craig C. Martin & William L. Scogland, *Attempting to Undo the Scrivener's Error in* Young v. Verizon's Bell Atlantic Cash Balance Plan, 34 Emp. Relations L.J. No. 4 (Spring 2009).

[5] *See, e.g.*, Blank Rome LLP, Recent Developments in Employee Benefits & Executive Compensation (Oct. 2010), http://www.blankrome.com/siteFiles/Publications/00FFE0D1E47D51B82C4854C0EE08E80A.pdf (discussing circuit split between *Young* and "other jurisdictions such as the Fourth, Fifth, and Ninth Circuit [that] continue to prohibit retroactive correction of ERISA plan documents"); Robins, Kaplan, Miller & Ciresi LLP, Effect of Drafting Errors in ERISA Plans (Sept. 29, 2010), http://groups.rkmc.com/lawx/archive/2010/09/29/effect-of-drafting-errors-in-erisa-plans.aspx ("other courts have reached different conclusions" than Seventh Circuit); Katten Muchin Rosenman LLP Digest (Sept. 10, 2010), http://www.kattenlaw.com/files/Publication/2cb7c09a-52b5-4124-8865-02dfe237c1d9/Presentation/PublicationAttachment/bc9dbc19-3846-4340-b711-03180f347f55/Corporate_andFinancial_Weekly_Digest_

Clearly, there is considerable confusion among the courts, ERISA attorneys, and plan sponsors regarding how to deal with drafting errors in ERISA plan documents. It is well worth this Court's time to clarify that issue alone.

But there is a second, even more important issue at stake here. Why, exactly, are there so many errors in these ultra-important ERISA plan documents? After all, some plans, like the one at issue in this case, deal with billions of dollars in liabilities and the financial well-being of tens of thousands of employees. So why are plan sponsors not more careful in drafting them?

The Court should not assume that material drafting errors in ERISA plan documents are inevitable. That is not how federal courts deal with other important legal documents. For example, federal courts impose *strict liability* on companies like Verizon for material misstatements in registration statements made in conjunction with new securities issues. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 382

September_10_2010.pdf (advising that *Young* is "remarkable" because it conflicts with "case law in a number of the other federal circuits dealing with a plan sponsor's ability to unilaterally correct retroactively a drafting error" and is "contrary to the IRS's consistently stated opinion that employers may not unilaterally correct retroactively drafting errors in plan documents"); Greensfelder, Hemker & Gale, P.C., Employee Benefits & Executive Compensation Update (Fall 2010), http://www.greensfelder.com/article-detail-page.aspx?article=483 (advising that IRS and other courts do not allow "such relief for scrivener's errors"); Steptoe & Johnson, ERISA Advisory (Aug. 23, 2010), http://www.steptoe.com/publications-7122.html ("[n]ot every court has taken the same view" as Seventh Circuit, and it is unclear which view will "prevail[]").

(1983) (Section 11 of Securities Act of 1933 imposes "stringent standard" of liability that is "virtually absolute, even for innocent misstatements").

As a result, companies like Verizon hire teams of lawyers to scour every word of a registration statement to ensure its accuracy, completeness, and clarity. In stark contrast, in this case, Verizon set out to radically alter an ERISA plan dealing with $5 billion in liabilities and tens of thousands of employees' retirement incomes and left the job to one overworked, inexperienced in-house counsel. App. 23a. Not surprisingly, the resulting document was littered with egregious, fundamental inconsistencies and unintended provisions. *See* Pls.' Pet. Certiorari at 6.

Why not hold corporations to the same strict liability standard for both a securities registration statement and an ERISA plan and encourage the same degree of care in drafting the document? Because the language of Section 11 more explicitly calls for strict liability than ERISA § 502(a)(1)(B)? No. *Compare* 15 U.S.C. § 77k (purchaser may recover damages where registration statement "contain[s] an untrue statement of a material fact or omit[s] to state a material fact") *with* 29 U.S.C. § 1132(a)(1)(B) (participant may recover benefits due "under the terms of" ERISA plan). Because investors rely more heavily on registration statements than ERISA plan participants do on plan documents? No. *See Kennedy v. Plan Adm'r for DuPont Savs. & Inv. Plan*, 129 S. Ct. 865, 875 (2009) ("ERISA's statutory scheme 'is built around reliance on the face of written plan documents.'").

In fact, since ERISA plan documents are all participants have to rely on, the federal courts should

"provide as strong an incentive as possible for employers" to draft them accurately. *Bergt v. Ret. Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139, 1145 (9th Cir. 2002). The best incentive is a standard of strict liability for unambiguous ERISA benefits, as enforced by the majority of circuits. *Id.* (citing *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518–19 (10th Cir. 1996); *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 981–82 (5th Cir. 1991); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907–08 (2d Cir. 1990); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136–37 (6th Cir. 1988); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566, 1570–71 (11th Cir. 1985)).

But Verizon's proposed solution and the Seventh Circuit's liberal approach to reformation undermine this crucial public policy concern. Both solutions will lead to more careless plan drafting, more participant confusion, and less certainty in ERISA plans. *Contra Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (ERISA was designed to ensure that participants may, "*on examining the plan documents*, determine exactly what [their] rights and obligations are under the plan").

By accepting Plaintiffs' petition (and denying Verizon's), then, this Court can right the ship by putting plan sponsors on notice that ERISA plan documents are more than mere formalities. Unambiguous, fundamental promises in these documents should be strictly enforced, unless they clearly contradict other plan terms or ERISA, just as Congress intended. See 29 U.S.C. § 1132(a)(3)(B)(i)–(ii).

CONCLUSION

The Court should grant Plaintiffs' petition for a writ of certiorari in No. 10-765 and deny Verizon's conditional cross-petition in No. 10-911.

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